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IN THE

Supreme Court of the United States

October Term, 1969

No. .....

490

JAMES M. SINCLAIR, JR.,

Petitioner

vs.

ANNA ROZA BOUGHTON,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES M. SINCLAIR, JR.
Petitioner Pro Se
Room 404
1680 North Vine Street
Los Angeles, California 90028

Jeffries Banknote Company, Los Angeles — 746-1611

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner James M. Sinclair, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the docket in the above entitled case under the date of June 3, 1969.

Citations to Opinions Below

The two memorandum opinions of the judge of the District Court are unreported and are printed in the Appendix hereto, infra p. 3b. The opinion of the Court of Appeals is printed in the Appendix hereto, infra p. 1c, and is presently unreported.

Jurisdiction

The judgment of the Circuit Court of Appeal was entered in the docket under the date of June 3, 1969. P. 1c, infra. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Question Presented for Review

Was it constitutional for an Act of Congress and a Treaty to end the United States citizenship of a woman residing in his country who married an alien ineligible to United States citizenship and entry?

Statutes Involved

Section 3 *Proviso* of an Act relative to the Naturalization and Citizenship of Married Women, 42 U.S. Stat. 1021, stated at page 1022:

> *"Provided,* That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States."

The Treaty, 16 U.S. Stat. 775, stated:

> "Article I. Citizens of the United States of America who have become, or shall become, and are naturalized according to law within the British dominions as British subjects, shall, subject to the provisions of Article II., be held by the United States to be in all respects and for all purposes British subjects, and shall be treated as such by the United States."

The Constitution of the United States, Section 1, Clause 1, of the Fourteenth Amendment, reads:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States . . ."

Since the proceeding draws into question the constitutionality of the Act of September 22, 1922, 42 U.S. Stat. 1021, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. Sec. 2403 may be applicable.

No court of the United States as defined by 28 U.S.C. Sec. 451 has, pursuant to 28 U.S.C. Sec. 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

Statement

Petitioner's complaint in the District Court sought a declaratory judgment that certain judgments against the respondent were valid (Record, infra p. 1b). The jurisdiction of the District Court was invoked under 28 U.S.C. Sec. 1332 alleging the petitioner to be a citizen of the State of California and the respondent to be a citizen of the Dominion of Canada (and alleging a justiciable controversy concerning a principal sum well in excess of $10,000.00).

Before pre-trial both parties brought to the attention of the District Court that respondent was claimed to have become an alien by reason of her marriage February 20, 1930, to Frederick George Boughton. There was filed with the District Court a copy of Report No. 2249 of the Committee on the Judiciary of the House of Representa-

tives, 82nd Congress, 2nd Session, and judicial notice was requested to be taken therefrom of the authoritative statements therein that respondent was an alien and that Mr. Boughton was an alien who had been convicted of 3 thefts before the marriage.

The District Court decided that the respondent did not lose her United States citizenship and therefore was a citizen of California and dismissed the action for lack of diversity of citizenship before pre-trial.

The Court of Appeal affirmatively found the respondent to be a citizen of California. The dismissal was affirmed on that ground and the Court of Appeal did not reach the other ground of dismissal, that there was a parallel state court action.

Reasons for Granting the Writ

The courts below found AS A MATTER OF LAW before pretrial or testimony that respondent could not have been expatriated. This could have been done only by considering that since petitioner failed to plead that respondent made a formal renunciation of citizenship, that retroactively under *Afroyim* v. *Rusk*, 387 U.S. 253, as a matter of law no other proof of expatriation would suffice.

1. *Afroyim* did NOT so decide. *Afroyim* did reverse for a new trial the lower court judgments that Congress could forcibly take away citizenship for the bare act of voting in a foreign election. *Afroyim* did NOT preclude a trial of the issue that Mr. Afroyim may have in fact renounced his citizenship. A District Court might well

find the circumstances of respondent's life for decades abroad AND marriage in his country to an alien who could not even enter the United States, the public policy favoring the stability of the marriage relation, AND foreign naturalization AND judicial notice of the Congressional Report AND further, testimony under the petitioner's constitutionally guaranteed due process right to cross-examine the respondent AND so forth, all proved expatriation in fact of the respondent.

2. *United States* v. *Perkins,* 17 F.Supp. 177 (D.D.C. 1936), explains the Treaty provision which made the respondent here, Mrs. Boughton, a naturalized British subject upon marriage to a British subject under the British statutes. Citing *Missouri* v. *Holland,* 252 U.S. 416, the court in *United States* v. *Reid,* 73 F.2d 153 (C.A.9, 1934, certiorari denied on jurisdictional grounds, 299 U.S. 544), upheld this Treaty over the contention that the treaty violated the Constitution; petitioner urges that any criticism of this case can be distinguished. It should be clearly settled by this Court whether the *Afroyim* case means the Executive's treaty power is thereby in conflict with the Fourteenth Amendment. It is of greater importance for the executive branch of government to learn the constitutional limits of its treaty powers. In an International Court of Arbitration could the United States have defeated the Crown's right, or the respondent Mrs. Boughton's right as a British subject, to recover against the United States by saying that the *Afroyim* decision overcame the Treaty and that as she was thus still a United States citizen the court had no jurisdiction? The Treaty was adopted to forestall inter-

national wrangling, nay, even war again with Great Britain, and makes facile provision for renaturalization; it is not expecting too much of the respondent that she comply with the renaturalization laws to make her allegiance clear. It may be noted that this Treaty was unanimously ratified in the Senate only four years after the exact clause at issue of the Fourteenth Amendment was proposed by the Senate itself.

Petitioner submits to the Court that any bare fear of a tyranny of the majority in Congress causing unreasonable expatriation treaties, or statutes, should only be met by this Court in the same way it would meet a like and certainly expatriating unreasonable death penalty for temporarily unpopular acts, by a deliberated limited nullification under constitutional due process requirements or the Eighth Amendment, etc., which will not impair the reasonable and necessary powers of the executive and legislative branches of government. In fact the 2nd section of the same Fourteenth Amendment implies that even the states have power to restrict the incidents of federal citizenship: for participation in crime or rebellion, the right to vote in federal elections may freely be denied.

3. This Court has in the past found it constitutionally proper for a woman to be given the citizenship of her husband, partly due to the unique public policy favoring the stability and unity of the marriage relation. *MacKenzie* v. *Hare,* 239 U.S. 299.

A woman's marriage is her whole life.

> "Thy people shall be my people, and thy God my God." Ruth 1:16

Conclusion

Because of the importance of settling the constitutional question concerning the conflict between the Fourteenth Amendment as recently interpreted by the divided *Afroyim* Court and the Treaty power; and because the decisions of the lower courts are urged to be in conflict with the probable decision of this Court in that (1) in precluding a trial of the facts the courts show a gross misinterpretation of the *Afroyim* decision, and (2) the uniqueness of the marriage relation indicates the *MacKenzie* case should be followed by the District Court in preference to the *Afroyim* case; THEREFORE the petitioner prays this Honorable Court to issue its Writ of Certiorari.

Respectfully submitted,

JAMES M. SINCLAIR, JR.
Petitioner Pro Se

August, 1969.

APPENDIX

Order of the Court of Appeals Settling Record

(caption omitted in printing)

Upon motion of the appellant, it appearing to the Court's satisfaction to be just,

IT IS ORDERED:

That this appeal will proceed on a Record of Appeal consisting of certified copies of the docket entries of the district court and the copies of the Supplemental Record here filed by the appellant (deleting the Order but retaining the Concise Statement of Points Relied Upon By Appellant),

That any briefs subsequent to appellant's brief may direct the Court's attention to any parts of the record described in F.R.A.P. 10(a) by quoting from office copies of the originals if such direction is necessary.

That appellant shall serve and file his typewritten brief within 40 days.

DATED:
January 20, 1969

/s/ R. H. CHAMBERS
UNITED STATES CIRCUIT JUDGE

/s/ CHARLES M. MERRILL

Settled "Supplemental Record"

(Caption omitted in printing)

The complaint asks for: declaratory relief that certain foreign state judgments are valid as against defendant's controversy thereof over $18,000.00, and for an injunction against her claiming against them. The defendant made a general denial to the complaint by an Answer. The judgments sued on held the parties to have never been married and that the plaintiff is free from all bond of purported marriage.

When the action began the plaintiff was a citizen of California. When the plaintiff became a citizen of Michigan, defendant filed a complaint for divorce against him in the Los Angeles Superior Court. Service of the complaint has not been made, nor has publication been ordered.

The plaintiff claims the defendant to be a citizen of Canada and she claims to be a citizen of the United States, and by residence, California.

On February 20, 1930, she married in Canada a citizen [SR-1] of Canada who had earlier been convicted of three thefts. She lived in Canada from about 1925 to about 1945.

In 1952 the Committee on the Judiciary of the House of Representatives submitted Report No. 2249 to the House in which it declared the defendant to be an alien, being informed of her claim to birth in Idaho and the marriage to an alien thief.

The plaintiff submitted to the District Court that: by marrying an alien ineligible for citizenship the defendant expatriated herself under the proviso at 42 U.S. Stat. 1022; and that the court was required to take judicial notice of the Congressional Report on file in the court, a point never replied to by either defendant or court.

The plaintiff had been ordered to show cause why the action should not be dismissed because of the pendency of the state divorce action and had filed briefs, upon the hearing of which the District Court declined to dismiss, but continued the matter to allow the defendant to secure state court service of process upon the plaintiff. Later the District Court dismissed the action before pre-trial, despite plaintiff's urging that such was an abuse of discretion in the light of the record's failure to show whether or not the state proceedings could adequately deal with the plaintiff's claims as required by the principle of the *Brillhart* case. The plaintiff also protested to the trial court the record's failure to show any consideration of the other *Brillhart* principles of: economy, primarily issue of Federal law, lack of jurisdiction in the state court over the plaintiff or to divorce non-residents, lack of jurisdiction in the state court to grant the relief sought by the Federal complaint, the state action being dilatory and filed long after the federal action, and that plaintiff has a right to have the action heard in federal court rather than removed to a state court. [SR-2]

ENTERED
NOV 29 1966
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By
Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES M. SINCLAIR, JR., Plaintiff, v. ANNA ROSA BOUGHTON, etc., Defendant.	No. 65-557-FW ORDER DISMISSING ACTION

This case came on for hearing on the 28th day of November 1966 on an order to show cause why the case should not be dismissed because of a pending state action in which the defendant herein sues plaintiff herein for a divorce and for settlement of property rights between such parties. Defendant appeared through her counsel at such hearing but no one appeared for plaintiff. It appears that the order to show cause had previously come on for hearing on October 31, 1966, at which time both plaintiff and defendant herein were represented by their respective counsel, and the matter was then continued until November 28, 1966, in order that counsel might prepare and file legal memoranda.

It appears that there are several grounds why this action should be dismissed. The first ground is the failure

of plaintiff herein to appear and oppose said order to show cause. [SR-3]

The next ground justifying dismissal of the action is that there is now pending in the Superior Court of the State of California a divorce action wherein the defendant herein sues plaintiff herein for a divorce and determination of their respective marital property rights. In that action all of the matters in controversy herein can be fully adjudicated so that a declaratory judgment sought by the plaintiff in this action is not warranted. Furthermore, the question as to whether or not defendant herein is or is not entitled to a divorce from the plaintiff herein can best be determined by the Superior Court of the State of California, whereof, as it appears from the record, both plaintiff and defendant are citizens. Under such circumstances this Court should not assume jurisdiction and proceed to determine the rights of the parties. See *Brillhart* v. *Excess Insurance Company*, 316 U.S. 491. The state proceedings can adequately deal with the claims of plaintiff herein.

Another ground for the dismissal of this action is that it appears from the record herein that both plaintiff and defendant are citizens of the same state, to wit, California. In such circumstances it is incumbent upon a federal court to dismiss the action for lack of jurisdiction. *Caffery* v. *New York Central R. Co.*, 324 F.2d 711 (C.A. 2, 1963); *Brandt* v. *Bay City Super Market*, 182 F.Supp. 937 (N.D.Cal. 1960). Accordingly,

IT IS HEREBY ORDERED that the action herein is dismissed without prejudice.

DATED:

FRANCIS C. WHELAN
UNITED STATES
DISTRICT JUDGE
[SR-4]

ENTERED
MAR 31 1967
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By
Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES M. SINCLAIR, JR., Plaintiff, v. ANNA ROSA BOUGHTON, etc., Defendant.	Civil No. 65-557-FW ORDER AMENDING ORDER OF DISMISSAL HERETOFORE ENTERED AND SETTING FORTH GROUNDS UPON WHICH ACTION WAS DISMISSED

In this action the Court on November 29, 1966, dismissed the above-entitled action on three grounds, to wit: (1) for failure of plaintiff to appear and oppose an order to show cause why the action should not be dismissed: (2) that there was pending in the Superior Court of the State of California a divorce action instituted by defendant herein against plaintiff herein in which said latter action all of the matters in controversy herein, together with the additional issue as to whether defendant herein is entitled to a divorce from plaintiff herein, can be fully adjudicated, and in which said latter action the Superior Court of the State of California can best determine the issues; and (3) that it appears from the affidavits on file and from the record in this action that both plaintiff and defendant are citizens of California so that there is no

diversity of citizenship as alleged in plaintiff's complaint. Plaintiff thereafter [SR-5] moved the Court for its order setting aside the said order of dismissal, or in the alternative to eliminate as a ground of said dismissal the failure of plaintiff to appear and defend against the order to show cause heretofore mentioned on November 28, 1966.

The said motion of plaintiff was noticed for and came on duly for hearing on March 27, 1967. After consideration of the matter the Court now makes this order.

The motion of plaintiff to set aside the dismissal of the action is denied.

The motion of plaintiff to eliminate as a ground for said dismissal the failure of plaintiff to appear and defend against the order to show cause on November 28, 1966, is granted.

The grounds for dismissal of the action are therefore the other two grounds set forth in the order of dismissal of November 29, 1966, to wit: (1) that it appears from the record that there is another action pending involving the same controversy in this action in the Superior Court of the State of California, and that in said latter action the defendant herein has sued the plaintiff herein for divorce as well as for an adjudication of property rights between the parties (while in this action the plaintiff merely seeks an adjudication concerning property rights alleging that the parties are divorced), and that the whole controversy between the parties can best and more properly be adjudicated in the Courts of the State of California; and (2) that there is no diversity of citizenship

in this action as alleged by plaintiff in his complaint, it appearing from affidavits filed and the whole record that both plaintiff and defendant are citizens of the State of California. By the holding that there is no diversity of citizenship, the Court held that [SR-6] defendant herein did not lose her American citizenship as urged by plaintiff.

DATED: March 30, 1967

FRANCIS C. WHELAN
United States District Judge [SR-7]

CONCISE STATEMENT OF POINTS RELIED UPON BY THE APPELLANT

1. The District Court erred by refusing to take judicial notice of the Congressional Report.

2. The District Court erred by deciding that the defendant did not lose United States citizenship by marrying an alien thief.

3. The District Court abused its discretion, in dismissing the action because of the pendency of a parallel state court action, when the District Court record failed to show the consideration required in the record by the Supreme Court to sustain such exercise of discretion. [SR-8]

Opinion of Court of Appeals for the Ninth Circuit

(caption omitted in printing)

Before: CHAMBERS, DUNIWAY and ELY, Circuit Judges

Jurisdiction of this action was based on diversity of citizenship, 28 U.S.C. § 1332. Plaintiff alleged that he was a citizen of California and that defendant was a citizen of the province of Ontario, Canada. The trial judge correctly found that defendant was a citizen of California. Thus, there was no jurisdiction. The action was dismissed on that ground, among others. We do not pass upon the other grounds.

Affirmed.

/s/ Richard H. Chambers

/s/ Ben C. Duniway

/s/ Walter Ely
United States Circuit Judges